

Internal Revenue Service
memorandum

CC:TL-N-4680-88

Brl:CEButterfield

date: MAR 30 1988

to: District Counsel, Washington, D.C.

CC:WAS

from: Director, Tax Litigation Division

CC:TL

subject: [REDACTED]

This is in response to your March 7, 1988 request for technical advice.

ISSUE

Whether petitioner could be awarded his \$60 filing fee as part of a stipulated dismissal of the above-captioned case. 7430-0000.

CONCLUSION

Petitioner may be awarded his filing fee under I.R.C. § 7430, in settlement of this case.

FACTS

The Philadelphia Service Center, in conducting a computer match of income documents determined that petitioner had unreported taxable income in his [REDACTED] year. The taxpayer requested an explanation on [REDACTED], to which he received a reply four months later. Taxpayer made a written request for a hearing on [REDACTED]. On [REDACTED] a notice of deficiency was issued. Taxpayer filed his petition on [REDACTED]. The Appeals Office confirmed that the computer match had determined a deficiency in error in [REDACTED] and prepared stipulated decision documents. The file reflects that petitioner attempted to contact the Appeals Office by telephone in [REDACTED], and again in [REDACTED], apparently to address the issue of the \$60 filing fee before executing the stipulated decision.

LEGAL ANALYSIS

Section 7430 allows the court to award fees and costs to

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successful petitioners in civil actions under the Code. Petitioners must first exhaust the administrative remedies available within the Service. Here petitioner clearly did so. See Treas. Reg. §§ 301.7430-1, 301.7430-1(f)(2). In order to be eligible for an award of fees, in cases commenced after December 31, 1985, petitioner must show that the government's position was not substantially justified, and that they substantially prevailed. There is no question in this case about the latter requirement -- the case will be fully conceded. As to the former, that the Government's position is not substantially justified, the Tax Court has held that the position of the Government will be the position taken in litigation, after the petition is filed (or when District Counsel first becomes involved, if earlier). Sher v. Commissioner, 89 T.C. 79 (1987). We do not believe that the Government could be held to have fallen below this standard, where it took no action, after the petition was filed, other than to confirm the error and concede the case.

The court has found on some occasions, however, that if concession was unreasonably delayed, the delay itself will be cause for an award of fees under section 7430. Stieha v. Commissioner, 89 T.C. No. 55 (October 8, 1987). In this case it has required approximately six months to resolve the issue of the filing fee in order to obtain a stipulated dismissal. The delay, and the fact that petitioner is pro se, might lead the court to issue an opinion that finds this delay unreasonable. Such an opinion could shorten the time for District Counsel to concede a case without risking an award of fees. Therefore litigating hazards are present. Moreover, to force a pro se petitioner into litigation over the filing fee when a Service error caused him to be in Tax Court in the first instance will place the Government in a very unfavorable light. For these reasons we have authorized the payment of petitioner's \$60 filing fee. Attached please find an award data sheet, which you may submit to us with the final decision document, so that we can request payment from the General Accounting Office.

If we may be of further assistance with regard to this matter, please do not hesitate to call Ms. Clare E. Butterfield, at 566-3442.

MARLENE GROSS

By:


GERALD M. HORAN
Senior Technician Reviewer
Branch No. 1
Tax Litigation Division

Attachment:
as stated

Payment of Reasonable Litigation
Subject: Costs Awards by the Tax Court **Cancellation Date:**

The Tax Reform Act of 1986 modified I.R.C. § 7430, to provide that awards of reasonable litigation costs by the Tax Court will be made in the same manner as an award by a district court. The General Accounting Office will pay these awards from the General Judgment Fund. In cases where an award has been made, or this issue has been settled, the attorney to whom the case is assigned should complete an Award Data Sheet, copy attached. A copy of the decision must also be attached; otherwise the General Accounting Office will not process payment. After completion it should be sent to the Director, Tax Litigation Division. Upon receipt, we will transmit the necessary documents to the General Accounting Office for payment.

Signed: Robert P. Ruwe

ROBERT P. RUWE
Director,
Tax Litigation Division

Attachment:
Award Data Sheet

Filing Instructions: Binder _____ Master Sets: NO__ RO__
NO: Circulate__ Distribute X to: All Personnel__ Attorneys X in: TL
RO: Circulate__ Distribute X to: All Personnel__ Attorneys X in: ALL OFFICES
Other _____

AWARD DATA SHEET

A. CASE CAPTION AND DOCKET NO. _____

B. PAYEE(S)1/ _____

C. ADDRESS OF PAYEES _____

D. NAME AND ADDRESS OF PETITIONER'S COUNSEL* _____

F. AMOUNT CLAIMED2/ _____

F. AMOUNT TO BE PAID3/ _____

G. ATTORNEY'S FEE AMOUNT _____

1/ Name(s) of payee(s) must be exactly as set forth in the court's order or stipulation of settlement.

2/ Amount sought by petitioner(s) originally or by amended motion.

3/ Amount includes attorney's fees, costs, and experts reports, etc.

* In general the check will be mailed to the petitioner in care of opposing counsel.

IMPORTANT: ATTACH COPY OF DECISION

If any questions arise, please contact *Clare Butterfield*
~~Helen Rogers~~ at FTS
~~566-3521~~ 566-3442